No. 76-778

In the Supreme Court of the United States

OCTOBER TERM, 1976

NATIONAL CLASSIFICATION COMMITTEE, APPELLANT

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION OF THE UNITED STATES TO AFFIRM

DANIEL M. FRIEDMAN,
Acting Solicitor General,
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Washington, D.C. 20530.

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Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States moves to affirm the judgment of the district court.

STATEMENT

This is an appeal from an order of a three-judge district court setting aside a reclassification by the Interstate Commerce Commission of less-than-truckload shipments of passenger automobiles and remanding to the Commission "for the development and consideration of cost evidence relating to the classification increase" (J.S. App., p. A-11).

The background of this litigation was lucidly stated by the district court (J.S. App., pp. A-2 to A-4; footnotes omitted):

Classification is the process of assigning numerical ratings to commodities in an attempt to portray their transportation characteristics. The ratings are expressed as percentages of certain established first class rates. Various factors relating to a commodity are considered, such as density, value, susceptibility to damage, difficulty or care involved in handling, stowability, value of service, and trade competitive conditions. The cost of shipping a particular article may be determined from its weight, its classification rating and the existing tariff or rate. Thus, although they are distinct elements, both classification and rate play a part in establishing the ultimate cost of shipping a commodity.

Since 1936, when the motor carrier industry adopted its classification system wholesale from railroad provisions, the classification applicable to passenger automobiles has remained unchanged. In the late 1960's, as a revenue-producing measure, certain motor carrier tariff associations permitted classification exceptions for automobiles which resulted in higher charges than under published ratings. This prompted a series of claims and legal actions for reparations against individual motor carriers. The carriers thereupon petitioned the National Classification Board, which, after investigation and notice, proposed an increase in classification from 150 to 250 for less-than-truckload (LTL) shipments of passenger automobiles. The proposed schedules, however, were suspended following a protest by the Department of Defense, a major shipper of jeeps, military vehicles, and decedents' automobiles. *See* 37 U.S.C. §554(a)(b) (statute as amended in 1965 to permit shipment of automobiles of deceased Vietnam servicemen at public expense).

Following suspension of the proposed classification schedules, the Commission undertook an investigation to determine whether the schedules were just and reasonable under Section 216(g) of the Interstate Commerce Act, 49 Stat. 543, 559, as amended, 49 U.S.C. 316(g). In the administrative proceedings relating to that investigation, the Department of Defense introduced cost data designed to show that under the existing classification schedules the motor carriers earned a fair return on LTL shipments of passenger automobiles and "that the proposed classification increase would result in revenues far in excess of those considered necessary by the ICC to produce a reasonable return for carriers" (J.S. App., p. A-7). Appellant National Classification Committee intervened and objected to that evidence on the ground that cost considerations are "totally irrelevant in classification proceedings" (*id.* at A-7 n. 7).

The Hearing Examiner admitted the cost data into evidence but concluded that that evidence had "little probative value" (J.S. App., p. D-8).[1] The Hearing Examiner further stated that "although the cost exhibits have been admitted into evidence, it should be

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[1]The evidence submitted by the Department of Defense, based on a study of 219 LTL shipments of passenger automobiles in the three areas of the country where such shipments principally occur (the Transcontinental, South-Central, and Southwestern to Eastern Central Territories), consisted of a comparison of the carriers' average cost per shipment with average revenues under both the existing and proposed classifications (J.S. App., pp. D-7 to D-8). The Hearing Examiner believed the evidence to be deficient because it was not of nationwide applicability and because the average cost figures reflected 1968 levels whereas the average revenue figures included consideration of some class rates that were in effect as late as 1970—a disparity that the Hearing Examiner thought "would tend to overstate the ratio of revenues to cost under both the present and proposed classification basis" (J.S. App., p. D-8).

pointed out that the Commission has generally held that cost considerations are entitled to little weight in proceedings involving class ratings for specific commodities" (J.S. App., p. D-9). The Hearing Examiner then determined that the proposed reclassification was lawful under Section 216(g) and should be allowed to take effect (J.S. App., p. D-17). The Commission affirmed and adopted the decision and order of the Hearing Examiner (J.S. App., p. E-1).

The United States sought review of that decision in the United States District Court for the District of Columbia pursuant to 28 U.S.C. 2321-2325.[2] The court rejected "[d]efendants['] argu[ment] that cost data is not entitled to probative weight in classification proceedings" (J.S. App., p. A-4), holding that "[t]o prevent arbitrary or unreasonable classifications, the ICC * * * cannot ignore cost and revenue data when a claim is raised, with substantiation, that an existing classification suffices to assure a fair, compensatory return to carriers" (*id.* at A-11). The court determined that cost and revenue data must be given "proportional * * * consideration" (*ibid.*), and that under that standard "the minimal significance attached to this data by the ICC was erroneous" (*id.* at A-7). "Finding a failure to evaluate adequately cost and revenue data" (*id.* at A-11), the district court remanded the case "to the ICC for the development and consideration of cost evidence relating to the classification increase" (*ibid.*).

ARGUMENT

1. The district court correctly held that cost and revenue data that substantiates a claim that an existing classification

[2]Superseding provisions for the review of the Commission's orders have since been enacted. See Act of January 2, 1975, Pub. L., 93-584, 88 Stat. 1917.

produces a fair return to carriers must be given "proportionate" consideration in classification proceedings. That result is required by the plain language of Section 216(i) of the Interstate Commerce Act, 49 U.S.C. 316(i), which directs the Commission, in prescribing classifications, to give "due consideration" to both cost and revenues:

> In the exercise of its power to prescribe just and reasonable * * * classifications * * * the Commission shall give due consideration among other factors, * * * to the need, in the public interest, of adequate and efficient transportation service by such carriers at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable such carriers, under honest, economical, and efficient management, to provide such service.

Appellant seeks to brush this provision aside as a "broad policy declaration[ ]" (J.S. 13), but it offers no reason why that "policy declaration" should not be followed by the Commission. Appellant cannot mean that the broad language of the provision is not reducible to specific, concrete, transportation factors, for the Commission long has isolated specific factors that must be considered in classification proceedings. See *All States Freight* v. *New York, New Haven & Hartford Railroad Co.*, 379 U.S. 343, 345 n. 2. Nor can appellant mean that the statute, broad as it is, does not extend to cost and revenue data, for two of the small number of factors explicitly listed in the statute are "cost" and "revenues".[3]

[3]The Commission acknowledges (Memorandum, p. 7) that "[c]ost considerations are taken into account * * * in the transportation characteristics that have traditionally determined a commodity's

The fundamental purpose of a classification rating is to ensure that each commodity bears its fair share of transportation costs. In giving the Commission authority to classify commodities, Congress was well aware of the interrelationship between classification and rates and of the danger that classification might be used to manipulate rates. As the district court noted (J.S. App., p. A-10):

> The essential point is that classification is not to be an artifice or an "end around" method of increasing revenue—without supporting cost evidence. *Cf. Western Classification Case,* 25 I.C.C. 442, 453 (1912) (classification not an instrumentality for revising rates and charges). As was observed over 60 years ago during debate on legislation providing the ICC with specific classification authority, "[C]lassification of freight is just as important as rates, because by moving a particular article from one class to another you affect the rates." 45 Cong. Rec. 4578 (1910) (statement of Rep. Mann). Congressman Russell further explained this viewpoint:
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> > "[T]he shipper can be extorted from; he can be made to pay an unjust rate just as well through classification as he can through the fixing of a rate. The carriers can put an article in one classification, subject to a given rate, and if the Interstate Commerce Commission sees fit to declare that rate unreasonable, and reduce it, declaring what shall be a reasonable rate to take its place, the carrying corporation can obtain the same benefit and put the shipper under the same disadvantage by simply changing the classification of the article." *Id.* at 5142, quoted in *All States Freight, supra,* 379 U.S. at 350, 85 S. Ct. 419.

classification ratings." In the Commission's view, the district court's opinion merely requires explicit consideration of factors whose consideration previously had been implicit and accordingly works no change in substance in the Commission's practice (*ibid.*). Thus there is no basis for appellant's bald assertion that the decision below "will have a major effect upon motor common carriers" (J.S. 6) and a "serious impact" on the "general public" (*ibid.*).

The decision below averts the possibility that classification might be used to manipulate rates by requiring the Commission to give "proportionate consideration" to cost and revenue data whenever "a substantial issue of cost and revenue is raised" (J.S. App., p. A-11). This result is required by the language of the governing statute and is supported by the legislative history of the Act.

2. Both appellant (J.S. 14-16) and the Commission (Memorandum, pp. 8-9) assert that the district court exceeded the proper scope of judicial review and impermissibly substituted its judgment for the Commission's in regard to the evidentiary weight to be given to the cost data. We disagree. While it is true that the Commission did consider the evidence and criticized its probative value, the Commission also stated (J.S. App., p. D-9) that "cost considerations are entitled to little weight" in classification proceedings. This bias against cost data, as we have shown, represented legal error by the Commission, and it is impossible to determine from the Commission's decision whether the data would have been accorded more weight, notwithstanding the deficiencies perceived by the Commission, had it been evaluated free of the improper influence of that bias. The district court's judgment (J.S. App. B) suspending the Com-

mission's order and remanding for reconsideration of that evidence under the proper legal standard was therefore correct.[4]

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

DANIEL M. FRIEDMAN,
Acting Solicitor General.

MARCH 1977.

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[4]On the face of it, the district court's determination that the cost data made a *prima facie* showing that the existing classification provided compensatory rates to the carriers appears to differ from the Commission's view that the data had little probative value. But that part of the court's opinion, read in context, constitutes a determination, once the court had decided that substantiated claims pertaining to costs and revenues require consideration, that the cost data in this case met the threshold test of substantiation. In contrast to *Ralston Purina Co.* v. *Louisville & N. R. Co.*, 426 U.S. 476, where the lower court reweighed the conflicting evidence, set aside and annulled the Commission's order, and refused to remand for reconsideration, in this case the court did not direct the Commission to give any particular weight to the cost evidence but simply ordered the Commission to consider it without any presumptive prejudice against it. Indeed, the Commission itself has recognized that it "remains free on remand to find again, in light of all the evidence submitted, including the cost evidence, that the classification rating increase at issue here is just and reasonable" (Memorandum, pp. 7-8 n. 6). Since the district court's final disposition was correct, there is no reason for this Court to undertake plenary review merely in order to consider whether the language of the district court's opinion, taken out of context, might be regarded as evidence of a tendency to "overstep[ ] the proper bounds of its reviewing authority by substituting its own assessment of the evidence for that of the Commission" (*id.* at 8).